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TRENDSETTERS: ASIA-PACIFIC JURISDICTIONS LEAD THE WAY IN DISPUTE RESOLUTION

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The tectonic plates are shifting in international dispute resolution. The growth of global trade has been encouraged and, in turn, has encouraged the worldwide development of effective and enforceable international arbitration and mediation processes. As a result, there have been palpable changes made not only in the manner in which the increased number of disputes are resolved, but also in the sites that are chosen for their resolution. One of the defining events in the development of international arbitration occurred in 1923 when the International Chamber of Commerce (ICC), International Court of Arbitration was established in Paris. From that point and continuing for over 80 years, the center of gravity for most international proceedings was the Euro-American area, with United States law firms leading the way.¹ Then, beginning in the 1990s,² a significant change in trading patterns occurred and an increasing number of international disputes were processed in the Asia-Pacific (A/P) region and resulted in a steady rise in the importance of the region as it relates to dispute resolution.

Hong Kong and Singapore have emerged as A/P jurisdictions that have experienced a consistent acceleration in their dispute resolution activities and have become focal points for the resolution of international disputes, while the People's Republic of China (PRC) and others have been making concerted efforts to establish their credentials as "Arbitration Friendly" states.

This article will first present a general overview of Alternative Dispute Resolution (ADR) activity in the A/P region and elsewhere with an emphasis on one of the major contributors to the A/P region's growth—long-term, hi-value construction and energy (C/E) projects which frequently are time and weather sensitive and tend to be claims prone.³ This discussion will be followed by an analysis of several popular arbitration and mediation procedures used in the A/P region (and elsewhere) and will conclude with a summary of the efforts made by these states to develop dispute resolution practices that are both efficient and economical. All this being done in the context of the A/P's burgeoning economic, business and political importance, which prompted the boast that:

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¹ See YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE (1998).

² One of the drivers for this change was that in 1979 China had opened up to the West, and by the 1990s was experiencing unprecedented economic growth.

³ Many involved companies anticipate an increase in 2012 in disputes involving technology, engineering and healthcare. See FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT'S 8TH ANNUAL LITIGATION TRENDS SURVEY REPORT 9 (2011) [hereinafter FULBRIGHT'S LITIG. TRENDS 8TH].

If the 20th Century was the ‘American Century’ . . . then it is true that the 21st century belongs to the countries of the Asia-Pacific Region.⁴

I. DISPUTE RESOLUTION TRENDS

The major international arbitral institutions have set down firm ties in the A/P and together with the region’s providers, have established a vibrant dispute resolution ambience and a healthy competition throughout the region.

A. UNCITRAL

Any discussion of international dispute resolution must include a brief reference to the work that has been accomplished in this volatile area by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL is the core legal body of the United Nations in the field of international trade. One of its primary achievements has been the publication, among many other documents, of multiple Conventions, Model Laws and Rules dealing with the conduct of international commercial arbitration and conciliation.⁵ The most significant of these is the Convention on the Recognition and Enforcement of Foreign Awards (1958), commonly known as the New York Convention, and recognized as the linchpin of international dispute resolution.⁶ It has as its overarching objective the liberalization of procedures for enforcing foreign arbitral awards and doing so with a minimum of court intervention, tasks that it has performed admirably. Nearly 150 countries, from Afghanistan to Zimbabwe, are signatories to the New York Convention.⁷

B. General Findings

So, what is happening? The number of international arbitrations (including construction and energy (C/E) disputes) has grown steadily, with a recent increase of about 20 - 25% over previous years,⁸ brought about by, among other things, the effects of the worldwide financial difficulties. In 2009, one in seven United States companies had at least one international arbitration and in the United Kingdom arbitrations increased by over 20%. In-house counsel in both countries indicated a strong preference for arbitration of international disputes as opposed to adjudication by national courts.⁹ And, in 2010 the preference for arbitration increased in both the U.S. (to 40% from 34%) and in the U.K. (to 37% from 28%). Interestingly, there is a correlation between dispute resolution mode and company size; arbitration is more popular among mid-size than it is among large companies.¹⁰

⁴ Chakraborti and Chakraborty, *India and the Asia Pacific Region*, 1 ASIA-PACIFIC JOURNAL OF SOCIAL SCIENCES 1 (2010).

⁵ Throughout this article, the terms “conciliation” and “mediation” are used interchangeably.

⁶ *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958), available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

⁷ See generally Donald P. Arnavas, *Enforcing International Arbitration Awards Under the New York Convention: An Anniversary Report*, 4 INT’L GOV’T CONTRACTOR 84 (2007).

⁸ For example, see the annual reports of the ICC, Paris, available on the ICC website.

⁹ See FULBRIGHT & JAWORSKI L.L.P., FULBRIGHT’S 7TH ANNUAL LITIGATION TRENDS SURVEY REPORT 21 (2010).

¹⁰ See FULBRIGHT’S LITIG. TRENDS 8TH, *supra* note 3.

The United Kingdom, Switzerland, France and the United States remain the four most popular destinations for international arbitrations and Paris, Geneva/Zurich, London and New York the most frequently selected cities for international proceedings.¹¹ In the A/P, Singapore and Hong Kong have now made several appearances on the list of leading sites and appear poised and ready to extend their enhanced popularity.

C. International Providers in the A/P Region.

One reliable gauge of the growing importance of the A/P region as a center for international dispute resolution is the fact that three of the world's leading international arbitration providers are actively open for business there.¹²

The ICC, the largest truly international arbitral body which in the recent past has averaged nearly 700 international arbitrations per year (and had actual totals of 817 and 793 in 2009 and 2010) as compared to a total case load that averaged 250 only 30 years ago.¹³ The ICC maintains the first branch of its secretariat in Hong Kong and in 2010 opened a regional office in Singapore.

The London Court of International Arbitration (LCIA), in 2009, established its first independent office outside of London in New Delhi and introduced new arbitration rules—prepared expressly for use in India—which combine standard LCIA provisions with relevant Indian arbitral protocols. The LCIA had 270 new international cases filed in 2006/2007 (its totals are compiled in two-year increments) and an increase to 552 new matters for 2009/2010.¹⁴

The American Arbitration Association's International Centre for Dispute Resolution (ICDR)—whose annual international arbitrations approximate 600—has opened an office in Singapore in conjunction with the Singapore International Arbitration Centre (SIAC).

D. Local Providers in the A/P Region

Some of the progress made by China must be attributed to the 1995 enactment of the Arbitration Act of the People's Republic of China—popularly known as the Chinese Arbitration Act or CAA. The CAA was the first arbitration statute in the history of the PRC. It replaced earlier arbitral practice where there was no uniform arbitration law to regulate arbitration activities; where no arbitration agreement was required in order to initiate arbitration proceedings and where domestic arbitration awards were not final. These early proceedings were considered arbitrations even though they were really no more than administrative proceedings used to settle economic disputes.¹⁵ The CAA contains provisions that are expressly intended for use in international arbitrations and it codifies many of the more basic principles of modern arbitration law while, at the same time, underscoring the independence of China's existing arbitral commissions. Although, as mentioned

¹¹ See Dr. Stephan Wilske, *The Global Competition for the "Best" Place for International Arbitrations*, 1 CONTEMP. ASIA ARB. J. 31, (2008).

¹² See FULBRIGHT & JAWORSKI L.L.P., *FULBRIGHT'S 3RD ANNUAL LITIGATION TRENDS SURVEY REPORT* 26 (2006). The ICC was preferred by 43% of respondents with 33% preferring the LCIA, 9% favoring *ad hoc* self administered proceedings and 6% choosing arbitration under the ICSID rules (discussed below).

¹³ See ICC annual reports on ICC website, <http://www.iccwbo.org/>.

¹⁴ See LONDON COURT OF INTERNATIONAL ARBITRATION, *DIRECTOR'S GENERAL REPORT* 1 (2011) for those years.

¹⁵ See Hu Li, *An Introduction to Commercial Arbitration in China*, A.B.A. DISP. RESOL. J. (2003).

below, there is evidence of a willingness to permit more participation by non-Chinese lawyers,¹⁶ the general rule in China continues to be that in order to file court papers or advise on the particulars of Chinese law, they must affiliate with a Chinese law firm.

In addition to the arbitral providers specifically discussed below, the PRC has over 180 local arbitral commissions engaged in the resolution of domestic community disputes.

The leading dispute resolution institution in the PRC, the China International Economic and Trade Commission (CIETAC), has its headquarters in Beijing, maintains sub-commissions in Shenzhen and Shanghai and operates branch offices in several additional cities.¹⁷ CIETAC has taken steps aimed at changing the PRC's earlier image as a "no-go" international arbitral site and making its procedures easily accessible to all disputing parties, even though some negative perceptions persist.¹⁸ Some years ago a Hong Kong court recognized CIETAC's good work by noting that it had enforced many CIETAC awards and praising the general fairness of CIETAC's arbitration proceedings.¹⁹

Since its inception, CIETAC has revised its arbitration rules seven times—the most recent revisions became effective as of March 1, 2012. Among other things, the rules permit, subject to confirmation by CIETAC's Chairman, arbitrators from outside the CIETAC list to serve on its panels, arbitrations to be conducted with the place of the proceeding outside China, and both foreign and Chinese parties to integrate other arbitration rules (e.g., the UNCITRAL Arbitration Rules) into their CIETAC proceedings—an alternative that is of particular interest to parties that consider CIETAC to be too inclined to interfere in the conduct of an arbitration.²⁰ In addition, in May, 2011, CIETAC issued a revised listing of arbitrators. The list names approximately 1000 arbitrators, 218 of whom are foreign. It is envisaged that this panel with its wider geographic distribution will further enhance CIETAC's international reputation as did its joint symposium with the ICC, held in Beijing in July 2011. On the negative side, one observer has noted concerns over the speed and quality of arbitrator appointments, and the involvement of the CIETAC secretariat in drafting arbitral awards and procedural orders.²¹

The China Maritime Arbitration Commission (CMAC)—whose caseload consists primarily of arbitrating contractual and non-contractual disputes arising from transportation, production and navigation at sea—is headquartered in Beijing, has a sub-commission office in Shanghai and liaison offices in four other cities.

The Beijing Arbitration Commission (BAC) was founded in 1995 and its homepage describes it as the "arbitration organization with the most rapid development in China." BAC provides both arbitration and mediation services and many of its cases involve construction disputes. By the end of 2008 BAC had, since its founding, accepted 2826 cases involving construction disputes (approximately 20% of its total caseload).

¹⁶ See generally Anna Stolley Persky, *The New World: Despite Globalization, Lawyers Find New Barriers to Practicing Abroad*, 97 A.B.A. J. 34 (Nov. 2011).

¹⁷ All Chinese dispute resolution providers are referred to as "commissions."

¹⁸ See, e.g., Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010), http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf (whose survey respondents "have the most negative perception of Moscow and Mainland China as seats of arbitration.").

¹⁹ *Paklito Inv. Ltd. v. Klockner E. Asia Ltd.*, 2 H.K.L.R. 39 (1993).

²⁰ See Benjamin O. Kostrzewa, *China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?*, 15 PAC. RIM L. & POL'Y J. 519, 525-526 (2006) (noting that foreign parties typically receive favorable results in over half of CIETAC arbitrations).

²¹ See F. Hess, *Arbitration Environment in China: Where we are and the Road Ahead*, 7 TRANSNAT'L DISP. MGMT. 1, 3 (2010).

BAC has established working arrangements with several universities in the United States and engages in regular conferences, meetings and training sessions with them. In 2008 it introduced new mediation rules which it described as “cutting edge mediation culture, methods, skills and experiences for commercial cases.” The rules include a number of innovations for use in construction contract dispute mediations.²² BAC’s arbitration rules were also revised in 2008 and, among other things, permitted the appointment of arbitrators from outside BAC’s panel to preside over foreign-related proceedings. Among the several conferences that BAC presided over in 2011 was the Asia Pacific Regional Arbitration Group Conference.

The Shanghai Arbitration Commission (SAC) was founded in 1995 and its arbitration rules were revised in 2005. It hears both domestic and international matters. In April of 2011, SAC entered into a cooperative agreement with the Shanghai Commercial Mediation Center (SCMC) intended to increase its capability to mediate as well as arbitrate commercial disputes.

In South Korea, the Korean Commercial Arbitration Board (KCAB) maintains offices in Seoul and Pusan. In addition to arbitration and mediation the KCAB offers the disputing parties conciliation services designed to provide a “last chance” to achieve closure before more formal arbitral proceedings are initiated. A recent decision of the Korean Supreme Court indicates that the judiciary will rarely disturb an arbitral award.²³

On March 15, 2012, after several years of negotiations, the United States – Korea Free Trade Agreement (KORUS FTA) entered into force and added to Korea’s standing as an international economy to be reckoned with. Although not directly associated with dispute resolution, the KORUS FTA contains several sections that deal with the Parties’ alternatives when disputes concerning the FTA arise. The World Trade Organization (WTO) and its Agreement on Government Procurement (GPO) (discussed below) also figure prominently in the FTA’s dispute resolution process.

In Singapore, SIAC has recently experienced an “astounding” growth in arbitrations cases—its 2009 caseload increased to 160 new matters, a 60% increase from the 2008 figures.²⁴ Some of this gain has been attributed to the introduction of new facilities at the Maxwell Chambers in January of 2009, which according to its Chief Executive now provide a major international arbitral setting with “best-of-class hearing facilities.” SIAC issued the 4th Edition of its arbitration rules effective in July 2010.²⁵ The rules include provisions for emergency interim relief prior to formation of the arbitral panel and for expedited procedures.²⁶ Singapore’s standing has been further enhanced by arbitration friendly court decisions involving SIAC proceedings. For example, the Singapore Court of Appeals recently affirmed that it was proper for SIAC to assume jurisdiction over a case that required it to apply a hybrid of SIAC and ICC procedural rules, noting that SIAC was quite capable of performing the required functions and that the concept of party autonomy permitted the parties to choose the arbitration rules that would govern their arbitration.²⁷ Singapore’s international prestige has been further increased by its selection as the site for the 2012 International Council for

²² Included are Rules for Dispute Resolution Boards and Adjudication Boards which are discussed below.

²³ See Eun Young Park & Shinhong Byun, *Reconfirming Continued Support for the Autonomy of Arbitrations: Recent Developments in Korea*, ARB. NEWS (International Bar Association), March 2011, at 48.

²⁴ See Chris Crowe, *Asia’s Arbitration Explosion*, INT’L BAR NEWS (International Bar Association), August 2011, at 1.

²⁵ *SIAC Rules 2010*, SINGAPORE INT’L ARBITRATION CTR (Jul. 1, 2010), http://www.siac.org.sg/index.php?option=com_content&view=article&id=210&Itemid=130.

²⁶ *Id.*

²⁷ *Insigma Tech. Co. Ltd. v. Alston Tech. Ltd.* [2009] SGCA 24.

Commercial Arbitration (ICCA) conference. Its inclusion positions the county among the ten nations that comprise the Trans-Pacific Partnership (TPP) which has achieved the broad outlines of “an ambitious, 21st century TPP Trade Agreement” which promise to enhance trade and investment among the TPP partner countries.²⁸

The Hong Kong International Arbitration Centre (HKIAC) has also experienced a significant increase in its caseload—in 2009 746 new cases, including 429 arbitrations, were filed. There were 15% more arbitrations in 2009 than 2008. International cases increased by 79%, from 173 to 309.²⁹ Several factors have contributed to this increase. For one, the ongoing Closer Economic Partnership Arrangement (CEPA) between the PRC and Hong Kong has encouraged trans-border trade and has measurably increased Hong Kong’s economic activity. Also, for 13 consecutive years, Hong Kong has been selected by Canada’s Fraser Institute as the freest economy in the world and it has secured a first place ranking for freedom of international trade—significant contributions to its reputation for global business stability and for being arbitration friendly. In addition, in June 2011, Hong Kong’s new Arbitration Ordinance—“in tune with the latest and best international practice,” became effective. Among the Ordinance’s provisions are ones which eliminate the distinction between domestic and international proceedings; codify the confidentiality obligations that apply to arbitrations; and clarify the availability of interim measures. One commentator noted that the new Ordinance adopted many of the salient features of the UNCITRAL Model Law with virtually no changes.³⁰ Meanwhile, HKIAC’s International Arbitral Center has doubled its size with new hearing and office facilities.³¹

Some of the other states in the A/P regional have also taken steps to increase their arbitral activities.

1. *Taiwan*

Taiwan’s major obstacle insofar as being accepted as a leader among the A/P’s arbitral powers is the fact that it is not a signatory to the New York Convention. Despite this, at least one authority concluded that Taiwan seems prepared to meet international expectations such as offering internationally accepted dispute resolution mechanisms and noted that its Chinese Arbitration Association (CAA) is a well-established arbitral provider fully qualified to preside over international cases.³² In the past decade over 6% of Taiwan’s arbitration caseload involved foreign parties.³³ In addition to the CAA, two of Taiwan’s other arbitral providers, the Taiwan Construction Arbitration Association and the Chinese Construction Industry Arbitration Association, each focus on different specialized areas of construction disputes.

Taiwan also points to the speed and cost-efficiency of its arbitrations and notes that under Article 21 of the Taiwan Arbitration Law, an Arbitral panel must render an award within 6

²⁸ Statement from the Office of the United States Trade Representative, *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement>.

²⁹ See Hong Kong International Arbitration Centre’s publication *ASIAN DISPUTE REVIEW*, *available at* <http://www.asiandr.com/>.

³⁰ Justin D’Agostino, *New Hong Kong Arbitration Ordinance Comes into Effect*, KLUWER ARB. BLOG, <http://kluwerarbitrationblog.com/blog/2011/06/01/new-hong-kong-arbitration-ordinance-comes-into-effect/> (Last visited June 12, 2012).

³¹ Press Release, Government of Hong Kong, Boost for HK’s development as an international arbitration hub (June 1, 2011), <http://www.info.gov.hk/gia/general/201106/01/P201106010222.htm>.

³² See Wilske, *supra* note 11, at 55.

³³ Shu-Wei Lo & Edward Liu, *Arbitration in Taiwan*, CHINA LAW & PRACTICE (June 2011), *available at* <http://www.chinalawandpractice.com/Article/2839217/Channel/7576/Arbitration-in-Taiwan.html>.

months of the commencement of the arbitration unless the panel requests and receives a 3 month extension.

2. *Malaysia*

Malaysia, after resolving a number of controversies involving its judiciary and acting through the Kuala Lumpur Regional Centre for Arbitration (KLRC) has, among other things, adopted UNCITRAL's revised Arbitration Rules (2010) and publicizes its capabilities as a forum for the settlement of disputes through arbitration "in trade, commerce and investment within the Asia-Pacific region." With its booming economy, some observers have occasionally referred to Malaysia the "Silicon Valley" of the A/P region.

3. *India*

India's recent association with the LCIA appears to signal its intention to become more involved in international arbitration. The governing Indian arbitration statute is the Arbitration and Conciliation Act, 1996, which is based upon UNCITRAL's Model Law of Commercial Arbitration. India's courts are notoriously slow in their adjudication of commercial disputes—a rather staggering total of nearly 30 million cases are now pending.³⁴ The Arbitration and Conciliation Act was intended to provide a workable alternative to court adjudication and its ensuing delays. It applies to both domestic and international disputes and goes beyond the UNCITRAL Model Law in minimizing judicial intervention. Despite the presence of several domestic arbitral providers (and, now, the LCIA) there is a marked tendency in India to utilize *ad hoc* procedures in arbitral proceedings a practice that would be inappropriate in most international matters.³⁵ Construction/infrastructure is one of the leaders of the Indian economy and a frequent source of disputes. Note finally, that, the construction Industry Development Council (CIDC) and SIAC have established an arbitration center known as the Construction Industry Arbitration Council (CIAC) to arbitrate construction disputes.³⁶

4. *Japan*

Japan has rarely been selected as a site for international dispute resolution but has, nonetheless, displayed some positive arbitral stirrings. In 2005 the Japan Commercial Arbitration Association (JCAA) processed 10 international disputes. Its arbitration law was enacted in 2004 and in is based on the UNCITRAL Model Law. Japanese courts have shown some arbitration friendly tendencies. For example, foreign attorneys have, since 1996, been permitted to appear in

³⁴ See Krishna Sarma, Momota Oinam & Angshuman Kaushik, *Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution* 1-3 (Ctr. On Democracy, Dev., and the Rule of Law, Working Paper No. 103, 2009), available at http://cddrl.stanford.edu/publications/development_and_practice_of_arbitration_in_india_has_it_evolved_as_an_effective_legal_institution.

³⁵ See *id.* at 6.

³⁶ See *id.* at 11.

international arbitral proceedings which are conducted in a manner compatible with international norms for modern arbitrations.³⁷

5. *Vietnam*

Vietnam recently enacted a new arbitration law—the 2010 Law on Commercial Arbitration. Among other things, it allows foreign arbitrators to freely participate in arbitration proceeding—both domestic and international.

6. *Australia*

Australia’s international dispute resolution fortunes are constantly engaged in a battle against the “tyranny of distance.”³⁸ In July, 2010 the International Arbitration Amendment Act 2010 made several changes in Australia’s arbitration statutes designed to re-affirm its credentials as an arbitration friendly jurisdiction that will uniformly enforce foreign awards under the provisions of the New York Convention. The Australian Centre for International Commercial Arbitration (ACICA) offers comprehensive hearing and office facilities and serves as the default authority for the appointment of arbitrators pursuant to Article 11 of the UNCITRAL Model Law.³⁹

7. *Summary*

The total international arbitrations handled by the five leading A/P arbitral providers over the ten year period from 2000 through 2009 provides an good indication of their relative use among international disputants in the A/P region.⁴⁰

CIETAC-----	4862
HKIAC-----	3866
KCAB-----	645
SIAC-----	488
BAC-----	387

II. TRENDS IN THE USE OF ARBITRATION, MEDIATION AND THE INTERIM PROCESSES

Not only is the A/P region generating substantial numbers of disputes but it is also being introduced to additional dispute resolution procedures, such as adjudication, dispute boards, expert determination, and early neutral evaluation (the “interim processes”). Since they serve as a major economic impetus, these dispute resolution processes and techniques attain particular importance.

³⁷ See Akihiro Hironaka & Hiroyuki Tezuka, *Japan*, THE ASIA-PACIFIC ARBITRATION REVIEW (2007), available at <http://www.globalarbitrationreview.com/reviews/2/sections/4/chapters/24/japan/>.

³⁸ Attributed to Professor Luke Nottage of the University of Sydney Law School.

³⁹ Australia and New Zealand have consistently projected themselves as active members of the A/P region.

⁴⁰ See Chong Yee Leong & Qin Zhiqian, *The Rise of Arbitral Institutes in Asia*, THE ASIA-PACIFIC ARBITRATION REVIEW (2011), available at <http://www.globalarbitrationreview.com/reviews/31/sections/110/chapters/1189/the-rise-arbitral-institutes-asia/>.

A. Arbitration and the Interim Processes

A former chairman of the ICC, delivered a rather pessimistic appraisal of arbitration's "value" as a litigation substitute when he stated that:

The advantages of arbitration are becoming less and less obvious in the eyes of the parties to the dispute. The problem is not just that it often takes too long to resolve the dispute, but that the costs are no longer reasonable compared to what is at stake in the dispute.⁴¹

These sentiments are not especially new or novel. Indeed, arbitration's evolutionary trail is littered with attempts—some successful, some not—to devise a process that is simultaneously "a swift, inexpensive, and effective substitute for judicial dispute resolution."⁴² The following discussion will examine some alternatives that have been developed to bring the ADR process closer to a dispute resolution model that will serve as a true alternative to litigation. We will then consider several of the interim processes that are gaining favor in the A/P and are aimed at achieving greater system efficiency regardless of the specific process being employed.

B. Arbitration—General Concepts

Arbitration is a "finally determinative" form of dispute resolution broadly similar to but generally less formal than litigation, the outcome of which is binding, and in respect of which it is extremely difficult to appeal. International contracts, especially those involving construction disputes, often specify that if other attempts at resolving a dispute do not achieve closure, the parties must resort to arbitration of their dispute. There is a powerful reason why arbitration, rather than litigation within a court system, is preferred in such circumstances. Frequently, where a contractor or consultant is performing services outside its own country, it will be reluctant to have disputes regarding the quality of its work dealt with by a local court. Arbitration, in large measure, avoids this problem while litigation confronts it head-on, sometimes with unfortunate results. In addition, because of the New York Convention, enforcement of an international arbitration award is normally a relatively routine matter which insures that virtually all international awards can be enforced more readily than international court judgments.

Mention should also be made of an additional source of international dispute resolution involving government contract procurement. The World Trade Organization (WTO) is a multilateral organization with approximately 150 members. The Agreement on Government Procurement (GPA) is a plurilateral agreement—first negotiated in 1981 and open to WTO members who are entitled, but not obligated to subscribe to its provisions. The GPA currently has 41 members including Hong Kong, Japan, Singapore, South Korea, Taiwan and the United States—China is currently in the process of negotiating accession. The GPA's latest revisions became effective on March 30, 2012. One of its primary goals has consistently been to open up international

⁴¹ Robert Briner, Address given in Sydney at the program on "The Changing Landscape of International Commercial Arbitration" of the 75th Anniversary Congress of the Union Internationale des Avocats 14 (Oct. 29, 2002), published in NEWS FROM ICSID (Winter 2002), available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2005/09/01/000160016_20050901163656/Rendered/PDF/33321a10ICSID0news11912.pdf).

⁴² Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 683 (7th Cir. 1983).

government contracting to maximum international competition. Together with the WTO, the GPA provides extensive dispute resolution procedures and its revisions, among other things, continue to encourage transparency and fairness in the international procurement process.⁴³

C. The Interim Processes

Until relatively recently, arbitration, litigation, and (to a more minor extent) expert determination, were the most readily accessible forms of dispute resolution, and all were finally determinative. However, in recent years, new types of “temporarily determinative” forms of dispute resolution have become available, and these all function as “filters” to substantially reduce the number of disputes which must proceed to a finally determinative process. These Interim processes have become particularly attractive in the present distressed economic times, when in-house counsel are anxious to avoid the major costs associated with arbitration. The following outline illustrates some of the several interim processes (listed below) that are currently used in the A/P region.

Interim (Filters)

- Mediation
- Early Neutral Evaluation
- Dispute Boards
- Negotiation

Final

- Arbitration
- Court Litigation
- Expert Determination
- Adjudication

1. United Kingdom

A United Kingdom statute which came into force in the mid-90s, imposed an “adjudication” requirement on all construction contract disputes.⁴⁴ It required that all C/E disputes must be initially referred to an adjudicator whose decision is binding on the parties, unless—within a stipulated time—the matter is taken to arbitration. This procedure has proven quite efficient and the number of C/E disputes proceeding to arbitration has declined dramatically since its advent. Adjudication, which had its beginnings in the U.K., has been adopted in various Commonwealth countries as well as in several A/P jurisdictions (primarily Singapore, New Zealand and Australia). However, it has not altogether escaped criticism. For instance, one authority has commented that although the process is “facially attractive” and oftentimes results in prompt and informed dispute resolution while the evidence is fresh and the parties can most benefit from the opinion of an impartial expert, it, nonetheless, has shortcomings:

⁴³ See generally Anderson et al., *The WTO’s Revised Government Procurement Agreement – An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, 54 THE GOVERNMENT CONTRACTOR 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984216.

⁴⁴ Housing Grants, Construction and Regeneration, 1996, ch. 53, § 108 (Eng.).

It should work well for short, sharp, clear disputes. Experience shows, however, that short, sharp clear disputes do not often arise on construction projects or, if they do, they do not matter very much. Ugly, tough, complex disputes that matter a lot do not lend themselves to resolution by adjudication⁴⁵

2. *Dispute Boards*

Dispute Boards (DBs) normally involve a procedure whereby a standing panel of engineers/lawyers is appointed at the outset of a project and normally serves through completion of the work.⁴⁶ The DB inspects the job site throughout the duration of the project and deals with any incipient disputes.⁴⁷ This generally prevents many disputes from crystallizing into arbitrations. An alternative model provides for an *ad hoc* DB to be appointed once a particular dispute has arisen. Under this system, the DB remains intact until the dispute is resolved and a recommendation or decision is made.

DBs have been used with good results in Europe for multiple projects including most prominently the daunting Channel Tunnel undertaking linking France and the United Kingdom (which used two DBs one composed of Engineers and the other of finance specialists). The A/P with its current emphasis on construction and infrastructure has employed DBs on numerous larger undertakings. For example, DBs (among other methods) were used during the construction of the Hong Kong Airport, a most challenging engineering project that took 6 years to complete. The airport's cost was in excess of \$20 billion and involved 225 construction contracts. Four tiers of dispute resolution were used—the parties were first required to refer disagreements to a designated engineer for determination, if either party disagreed with the decision, a mandatory mediation was held, “adjudication took place if the mediation failed and arbitration was the final resort.”⁴⁸

DBs were also utilized on China's Ertam Hydroelectric Power Project which involved construction of a concrete arch dam and Asia's largest underground powerhouse. Total investment was \$3.4 billion for the project which commenced in 1991 and took eight years to complete.

Hong Kong has developed a successful variant to the DB known as the Dispute Resolution Advisor (DRA) system. Under this procedure an independent third party advisor is active throughout the project, resolving disputes as they arise. Among other things, it has been found that DRA response time constraints, good faith negotiations and the early involvement of the dispute resolution advisor have all had a positive effect in preventing claims from escalating into full fledged disputes. DRA has been used *inter alia*, for the construction of the Hong Kong Convention and Exhibition Center. Its use is required by local government for all C/E projects above HK\$200 million.

In Japan, three principle types of DBs are available: Dispute Review Boards (DRBs) which are also used widely in the United States, Dispute Adjudication Boards (DABs) which are the most

⁴⁵ PAUL STARR, POSITION STATEMENT, ADJUDICATION-SHOULD IT BE ENCOURAGED? 4 n.12 (2008) (on file with author); see also Denise Bowes, *Practitioner's Perception of Adjudication in UK Construction* (September 2007), available at http://www.arcom.ac.uk/-docs/proceedings/ar2007-0117-0125_Bowes.pdf.

⁴⁶ Most DBs are comprised of 3 members. In larger projects, 5 to 7 members are sometimes used. See generally STARR, *supra* note 45.

⁴⁷ Although used principally in construction contracts, DBs have proven effective in other long term, hi-value scenarios.

⁴⁸ STARR, *supra* note 45, at 5 n.3.

common form of DB used in international construction contracts, and Combined Dispute Boards (CDBs), introduced in 2004 by the ICC and intended to combine the advantages of the other two basic types.⁴⁹

DBs work well, that is, they deal with and finally dispose of most the disputes that come before them--over 90% of disputes referred to a DB will not go beyond that procedure into arbitration or litigation. Why are they so efficient? One theory has it that prior to a DB's site visit, the contractor and the owner (who tend to regard the DB as an intruder) will join forces and attempt to resolve whatever relatively minor incipient disputes there may be. Obviously, the DB's practice of confronting disputes at a very early stage, before the parties' have become entrenched in their positions is also a significant factor in their rapid resolution. The DB procedure amounts to serial adjudication. It may be expected to be used increasingly on larger projects throughout the A/P and the result is likely to be a reduction in the number of formal arbitrations. However, the process can be costly and as a result, it is sometimes the case that parties will not appoint DBs notwithstanding that the contract so requires. This is from a sense (usually misguided) that they are saving money by avoiding the costs of the panel. In fact, as the history of DBs demonstrates, the reverse is true, the appointment of a DB will quite frequently reduce the overall costs of dispute resolution on a project.

The American Arbitration Association (AAA), the LCIA, the ICC and the HKIAC all have formulated rules specifically designed to regulate the conduct of proceedings before DBs. The ICC rules contain a provision encouraging the parties to resolve the dispute amicably, and another that provides for an internal review of the DB's determination and findings before it is transmitted to the parties.

3. *Expert Determination*

Expert determination is a little used procedure in which the parties engage a third party, with expertise in a particular subject-matter, to give a binding determination upon a specific question.⁵⁰ It is generally used for a single or a group of associated issues, and rarely for more complex disputes. Expert determinations are not subject to court control and their decisions are normally subject to very narrow appeal grounds.

4. *Early Neutral Evaluation*

Early Neutral Evaluation bears some similarities to expert determinations—the key difference being that the opinion of the evaluator as to the merits of a party's position is not binding. It is a voluntary procedure that encourages direct communications between adversarial parties about possible claims. Once the parties mutually agree upon an evaluator, they exchange written statements which describe the substance of the dispute, as well as the parties' views of critical liability questions and any damages issues. At an informal meeting at which the evaluator presides, each party is given the opportunity to comment on the facts and law upon which its claims or defenses are based. The evaluator then renders a written report. Either party is free to reject the

⁴⁹ See Toshihiko Omoto, *Resolution and Avoidance of Disputes in Construction Contracts*, JCAA NEWSLETTER (Japan Commercial Arbitration Ass'n, Tokyo, Japan), Nov. 2009, at 2.

⁵⁰ Not to be confused with experts retained by the parties whose opinions and findings are not binding and may or may not be accepted by the arbitral panel.

evaluator's conclusions. However, if the parties mutually agree, they may proceed to settlement discussions or utilize the evaluator or another party as their mediator.

The AAA as well as several other arbitral institutions has early neutral evaluation plans and protocols available for parties that wish to use this procedure.

D. Bilateral Investment Treaties

When the parties to a dispute are private entities, no particular jurisdictional difficulties arise when they set out to resolve their differences through international arbitration. However, matters become more problematic if one of the parties is a sovereign state, since the general rule is that absent their consent, they are immune from suit.⁵¹ A modern example of such consent is found in the dispute resolution provisions of Bilateral Investment Treaties (commonly known as "BITs") which offer a unique and important use of international arbitration in the case of private disputes that arise over investments made in a foreign jurisdiction.⁵² The most distinctive characteristic of BITs is the ability of non-party nationals to engage in arbitration—without prior consent—with another state party. By offering this right, BITs protect investments in those countries where investor rights are not already protected through existing agreements. For instance, in June 2011, Phillip Morris Asia which is based in Hong Kong, initiated an action against Australia under the Hong Kong-Australia BIT, contending that its most recent restriction on the sale of cigarettes in Australia violated the BIT's expropriation provisions.⁵³

By the end of 2009 there were approximately 2750 active BITs throughout the world, and several A/P countries have entered into multiple BIT agreements. For Example, the PRC has concluded 130 BITs, more than any other country except Germany;⁵⁴ South Korea has concluded approximately 70; Singapore has over 20 BITs and Hong Kong has entered into about 15.⁵⁵

BIT dispute resolution provisions typically require that the parties initially seek resolution of their dispute through consultation and negotiation (essentially a "cooling off" period ranging from three months to a year). If the dispute remains unresolved the investor may then pursue the matter in the courts of the party involved in the dispute, or seek resolution through some previously agreed upon dispute resolution method, or proceed to binding arbitration before the International Centre for the Settlement of Investment Disputes (ICSID) tribunal or any other international forum including *ad hoc* proceedings. According to a Report issued by the United Nations Conference on Trade and Development (UNCTAD), as of 2009, there have been a total of 357 known investor-state dispute settlement cases filed under a variety of international investor agreements.⁵⁶ Of these, 225 were filed with ICSID, 91 were filed under the UNCITRAL arbitration rules and 19 with the Stockholm Chamber of Commerce. The remainder were administered by several organizations or on an *ad hoc*

⁵¹ In the United States, an example of such consent is found in the 1887 Tucker Act, 28 U.S.C.A. § 1346 (a)(2).

⁵² See generally Donald Arnava, *Bilateral Investment Treaties: Motivation and Protection for Individual Investors*, INT'L GOV'T CONTRACTOR (Thompson/West, Eagan, M.N.), Nov. 2006, at 1.

⁵³ See Matt Siegel, *Move Against Smoking in Australia has Companies Trying to Prevent a Precedent*, N.Y. TIMES, June 28, 2011, at B2.

⁵⁴ See Hess, *supra* note 22, at 7; although some of its recent BITs are written more broadly, many earlier Chinese BITs limited the scope of arbitration to the amount of compensation to be paid in the case of expropriations.

⁵⁵ See International Centre for Settlement of Investment Disputes (ICSID) Database of Bilateral Investment Treaties, available at <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited June 26, 2012).

⁵⁶ *Latest Developments in Investor-State Dispute Settlement*, UNCTAD (2010), available at unctad.org/en/docs/webdiaeia20103_en.pdf.

basis. A total of 49 developing countries, 17 developed countries and 15 countries with economies in transition participated in these disputes.

ICSID is an autonomous organization with close links to the World Bank. It was founded in 1966 pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention). As of October, 2011, there are 157 signatories to the ICSID Convention. ICSID international arbitration proceedings may be conducted at the Washington, D.C. headquarters of ICSID or at whatever other New York Convention compliant venue to which the parties agree. As of June 2010, approximately 319 cases were being dealt with by the ICSID Arbitral Tribunal with about 30 new matters being docketed each year. Almost half of ICSID's docket relates to projects in the energy and public utilities sectors.⁵⁷

E. Mediation—General Concepts

When applying the “interim filter” and “finally determinative” labels mentioned earlier, mediation takes on a sort of dual identity. That is, when used as a free standing dispute resolution mechanism, mediation, if closure is achieved, is finally determinative and the parties' settlement agreement is fully enforceable as any other contract and in international matters, can typically be enforced under the New York Convention. However, if, as is frequently the case, mediation is an initial step that is required to be undertaken prior to either arbitrating or litigating the matter in dispute, it acts as an interim filter although it will often dispose of the dispute altogether.

Mediation is a process conducted in a strictly confidential manner by an independent third party who lacks authority to impose a solution and where the objective is to assist the parties in resolving their dispute. It is not adversarial—the complaint and answer that signal the start of litigation and arbitration do not exist in mediation, rather the parties file concise—hopefully factual—position papers and essential documentation with the mediator. One of mediation's most important characteristics is its flexibility. Thus, the manner in which proceedings are conducted can be varied depending on what is considered the best method to foster a settlement between the parties. Most proceedings are more akin to business meetings than to trials and generally last from a few hours to one or two days duration, with only the parties, essential witnesses and the mediator present. A relatively few are more formal, driven by detailed agendas and continue for several days or weeks, with an array of witnesses, attorneys and experts in attendance. The subject matter of the dispute being mediated can further influence the format of the proceedings. For instance, in the mediation of construction disputes it might be appropriate to start with dual opening presentations by the project manager and an accountant, followed by a viewing of videos or photographs of the job site. In any case, two important characteristics of mediations are the ability of the parties to modify their approach (in midstream if necessary) and the fact that the parties play a role in recommending changes in the manner in which the mediation is being conducted. Articles 11 and 12 of the UNCITRAL Conciliation Rules underscore these concepts:

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests to submit written materials, provide evidence and attend meetings.

⁵⁷ ICSID Convention signatories are free to bring other non-BIT matters to the ICSID Arbitral Tribunals; however, BIT disputes dominate its docket.

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for settlement of the dispute.

Most mediations have similar basic structures. They begin with the opening presentations mentioned above followed by a question and answer period. The parties then retire to “breakout rooms” where they are individually visited by the mediator. These *ex parte* caucuses form a critical aspect of the mediation process by providing each party with an opportunity to privately discuss the factual aspects of the dispute and possible settlement approaches in a forthright manner and in a confidential setting, while the mediator asks questions designed to encourage them to consider both the negative and positive aspects of their positions.⁵⁸ In these caucuses, mediators often act in a facilitative mode—not unlike “shuttle diplomacy” in which they assist in establishing position alternatives by persuasion, cajoling and encouragement without commenting on the merits of a position. As one authority put it:

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. . .⁵⁹

Less often, mediators will act in an evaluative mode—interjecting opinions and predictions regarding a party’s case. Obviously, statements made in the *ex parte* setting are confidential if so designated by the party and will not be revealed to the other party without specific permission.⁶⁰ On some occasions, the two techniques will both be used during the proceedings.

The *ex parte* caucus process continues as long as the mediator and the parties believe that there is some benefit to be gained from doing so. General meetings may be interspersed if an impasse is encountered or to discuss the progress that has been made and the issues that are still to be resolved. After this procedure has run its course, the parties will either reach a settlement or terminate the mediation. If a settlement is reached, the parties jointly prepare and execute a settlement agreement. Even if less than a complete settlement has been achieved, issues are frequently narrowed or eliminated as the case may be. In international mediation settlements, it is quite common for the mediator to then “change hats” and briefly become an arbitrator for the limited purpose of recording the settlement agreement “in the form of an arbitral award on agreed terms” thus allowing the parties to take advantage of the New York Convention for enforcement purposes.⁶¹

The chances of arriving at a mutually satisfactory settlement through mediation are quite favorable, and leading construction/engineering mediators often achieve success rates of about 75-80%. In the United States the settlement figure in mediations of contract disputes between the federal government and its contractors is even higher—reaching well into the 90% range.

⁵⁸ Known commonly as “reality testing.”

⁵⁹ Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996).

⁶⁰ The use of the evaluative technique varies. In some jurisdictions, e.g., the United Kingdom, it is rarely used, whereas in the PRC, mediators will often point out flaws in a party’s position. Nor is it uncommon for a Chinese mediator to suggest that the parties apologize for problems and difficulties that they may have caused.

⁶¹ As suggested in the UNCITRAL explanatory notes to Articles 12 and 13 contained in its Model Law on International Commercial Conciliation; U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL CONCILIATION WITH GUIDE TO ENACTMENT AND USE at 50-54, U.N. Sales No. E.05.V.4 (2004).

A recent mediation proceeding illustrates another important benefit of the process. The mediation involved a dispute regarding a series of federal government contracts and the amount in controversy exceeded \$2.5 billion. The mediation, held before co-mediators, consumed nearly one month and concluded in a settlement of over \$250 million for the contractor, plus a multi year extension of a contract with a value of several billion dollars. The contract extension was a peripheral issue unrelated to the main dispute—an “innovative solution” that became part of the parties’ settlement because of mediation’s flexibility and its ability to consider side issues so long as the parties agree to do so. Such a comprehensive result would not have been possible in either arbitration or litigation.

F. Mediation Activity in the A/P Region

How much mediation is there? In Europe, the principle mediator appointing body is the United Kingdom based Centre for Effective Dispute Resolution (CEDR) whose total English mediation market for 2010 was estimated at 6000 mediation proceedings—double the number in 2007.⁶² If only mainstream commercial cases are considered, there has been a 30% increase in CEDR’s caseload since 2007.

In the A/P, Chinese culture has long favored the use of compromise rather than coercion in resolving disagreements and has traditionally taught that litigation is a “last resort” that necessarily involves a loss of face and is very often understood to mark the end of a business relationship. The China Council for the Promotion of International Trade (CCPIT) and the China Chamber of International Commerce Conciliation Center (CCOIC) have, since 1987, maintained a mediation system which includes conciliation centers in a number of cities throughout China. These centers are oriented toward the resolution of local disputes. Most mediators speak only Chinese and are drawn from the local community—which would obviously limit the value of the process insofar as international matters are concerned.⁶³ In addition, mediation in the PRC is most often thought of in the context of the Med-Arb practice which is frequently criticized (discussed below). In addition to its regional centers, CCPIT/CCOIC has established the business oriented Beijing Conciliation Centre in Beijing and the Hamburg Conciliation Centre in Germany opening up the possibility of conducting international conciliation proceedings on a secure institutional basis.⁶⁴ It has also entered into partnerships and cooperative agreements with several institutional providers. Among these is the US China Business Mediation Center, a joint undertaking between CCPIT/CCOIC and the International Institute for Conflict Prevention and Resolution (CPR). Established in 2004, the Business Mediation Center does not maintain an office in a specific city, but administers projects by dispatching mediators to wherever commercial disputes arise. The parties normally choose their mediator. However, if they wish, CPR will assist in the selection of two neutrals—one American, one Chinese—to preside on a joint basis.

As mentioned earlier, BAC, effective in April 2008, established separate mediation rules with a view toward offering parties a viable alternative to arbitration. BAC prides itself on the

⁶² See CENTRE FOR EFFECTIVE DISPUTE RESOLUTION, THE FOURTH MEDIATION AUDIT 4 (2010).

⁶³ See Tim Hill, Hogan Lovelis, The Growth of International Mediation in the Region, Remarks at the CI Arb Asia Pacific Conference (May 27, 2011).

⁶⁴ See Hamburg Chamber of Commerce’s Beijing-Hamburg Conciliation Centre Hamburg, *available at* <http://www.hk24.de/en/fairplay/conciliation/347726/hamburg.html>.

dispatch with which it is able to conclude construction disputes through conciliation—the average is a 48-day duration from the acceptance of the conciliation.

Hong Kong's development as a mediation center was given an impetus by the success of the process in resolving with dispatch many of the disputes associated with the construction of its Airport. As one authority noted:

Following the success of mediation in avoiding more formal disputes on this project, it became a tool of choice for the resolution of disputes in the Hong Kong construction industry although the take up of mediation in other areas was slower.⁶⁵

The Hong Kong judiciary recognized the potential of mediation as a possible alternative to arbitration in the resolution of business disputes when in 2010 it permitted courts to take into account any unreasonable refusal to mediate when assessing costs at the conclusion of a case.⁶⁶

G. The Med-Arb Alternative

CIETAC's experience is that between 20 – 30% of the arbitral disputes brought to it are ultimately settled by mediation through a process of 'Med-Arb'.⁶⁷ This procedure, whereby the arbitral tribunal may turn itself into a mediator (and, if necessary, back into an arbitrator) could just as easily be termed Arb-Med, but regardless of its title it has certain inherent drawbacks that make its frequent use in the dispute resolution process somewhat problematic. Rule 40 of CIETAC's arbitration rules deals with a "blending the process of arbitration and mediation."⁶⁸ In summary, rule 40 provides that:

(a) With the consent of both parties, the arbitral panel may attempt to conciliate the matter during the course of the arbitration proceedings . . .

(b) The arbitral tribunal may terminate the conciliation and continue the arbitration proceeding if one of the parties so requests

(c) If conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award provided that any opinion, view, statement or proposal . . . made in the process of conciliation shall not be invoked in the subsequent arbitration proceedings . . . or any other proceeding.

The process has the advantage of being simple and convenient but some practitioners believe assumes too much of the participants and does not address the probability that parties will be less than forthcoming if they fear that statements that they make during a mediation and especially

⁶⁵ Hill, *supra* note 63.

⁶⁶ *See id.*

⁶⁷ *See generally* Alison Ross, *Navigating Chinese Arbitration Law*, GLOBAL ARB. REV., May 5, 2011, <http://www.globalarbitrationreview.com/news/article/29437/navigating-chinese-arbitration-law/>.

⁶⁸ TANYA KROZAK, INTERNATIONAL COMMERCIAL ARBITRATION/MEDIATION AT CIETAC 1 (1998) (citing Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT'L 164 (1998)), available at http://cfcj-fcjc.org/clearinghouse/hosted/17451-international_commercial_arb.pdf.

during its *ex parte* caucuses, could be used (consciously or subconsciously) to their detriment if the arbitration is resumed.

Nor would the situation be assisted by a regulation similar to the Hong Kong ordinance which requires an arbitrator who has participated in an unsuccessful mediation to disclose to the other parties as much of the confidential information obtained during the mediation as the arbitrator considers material to the arbitral proceedings.⁶⁹ The possibilities that this provision provides for abuse of the system are obvious. Indeed, the only circumstances where a transition from mediation to arbitration appears to be “safe”, would involve a complete change of neutrals, and this would mean an increased expenditure of time and money in bringing the new neutrals up to date on the facts in the case. Another “solution” would be to conduct the mediation without the use of any *ex parte* caucuses which, while reducing the potential for unfair disclosure of confidential information, would also severely diminish the effectiveness of the mediation proceeding.

The potential for missteps presented by Med-Arb is demonstrated by a recent case decided by a Hong Kong Court.⁷⁰ In that case an arbitral dispute in the PRC had moved from arbitration to mediation and, when that failed, back to arbitration and an award. The award was challenged on the grounds of public policy, since it was alleged that it was tainted by actual or apparent bias. The arbitral tribunal had formed a mediation panel consisting of the arbitrator appointed by the applicant, the secretary general of the arbitral commission and a third individual—a business executive who was believed to have influence over the respondents (who had never agreed to his appointment to the panel). The executive was directed to present the respondents with a settlement proposal and to “work on them” to accept it. The respondents eventually declined the settlement proposal and the arbitral tribunal found that the parties’ original agreement was invalid. The court concluded that all of this contributed to an appearance of bias that rendered the award unenforceable.

III. TIME AND COST SAVING DEVICES

While time and cost savings can be realized in the arbitration hearing itself, they are also potentially available during the proceeding’s *alpha* and *omega* periods—that is, before and after the hearing. For one thing, since scheduling an arbitration is not dependent on gridlocked court dockets and since the typical preliminary sparring by counsel—through discovery, motions and the like—commonplace in litigation, are not nearly as prevalent in arbitration—time and cost savings can be realized before the hearing commences. Similarly, post-hearing delays are usually minimized because of the finality that attaches to most arbitral awards and because of the relative ease of the award enforcement process.

A. “Chess-Clocking”, “Hot-Tubbing” and Other Innovations

There are a number of practices that can assist in achieving an economical and efficient hearing.⁷¹ And, a well organized case management conference presided over by an arbitrator who

⁶⁹ Hill, *supra* note 63.

⁷⁰ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] 3 H.K.C. 157 (C.F.I.).

⁷¹ See generally Gabrielle Kaufmann-Kohler, *Online Dispute Resolution and its Significance for International Commercial Arbitration*, GLOBAL REFLECTIONS ON INT’L LAW, COM. AND DISP. RESOL., Nov. 2005, <http://www.lk-k.com/data/document/online-dispute-resolution-and-its-significance-for-international-commercial-arbitration-global.pdf>.

has strong case-management skills and attended by all participants, either in person or by telephone, teleconferencing etc., is a necessary early step.⁷² It is good practice for the arbitrator to initially inquire if the parties have any desire to engage in settlement discussions or whether there is a possibility that an award can be rendered without a hearing on the basis of written documentation. Assuming that neither of these alternatives is chosen, standard procedural matters constitute agenda items that should be addressed in detail at the meeting—for example, the estimated length of the hearing, the issues that will be considered, the number of witnesses for each side, the method to be used for examining witnesses, the treatment of documentary evidence and the like. The understandings and tentative time durations attributed to these matters will, where appropriate, become benchmarks that the arbitrator can later refer to if chess-clock timing (discussed below) is used to monitor the fair allocation of time available to the parties.⁷³

The following is a representative sampling of some of the methods used in the A/P (and elsewhere) to assist in the conduct of an efficient hearing:

- The Hong Kong Arbitration Ordinance (mentioned earlier) offers a good example of the enhanced ability of the arbitrator to exercise control over the proceeding. Even though the Ordinance relies heavily on the terms of the UNCITRAL Model Law it makes some modifications. Article 18 of the UNCITRAL Model Law, for example, gives the parties a “full” opportunity to present their cases. However, Section 46 of the Ordinance modifies this right by providing that the parties shall have a “reasonable” opportunity to do so, thus providing added discretion to the arbitrator in ruling on an issue that is regularly raised during the course of arbitral proceedings. Without this language, some arbitrators, out of an abundance of caution, may be more readily inclined to grant a party’s request for extra time or some other concession in order to avoid the possibility of later criticism.

- The A/P region is generally familiar with and well disposed towards the time-saving technique of ‘chess-clock’ timing (each party has, say, 50% of the total time available, so that the hearing is concluded within its allotted period) although the arbitrator may allow added time under some circumstances.⁷⁴ Chess-clocking gives the parties an incentive for adhering to agreed upon schedules and provides the arbitrator with an objective method for controlling abuses.

- Submissions “on the record” refer to proceedings that are conducted entirely on the basis of the written record (sometimes supplemented by oral arguments). A modified on the record presentation is confined largely or entirely to written submissions, but permits witnesses to be orally examined with respect to their written submissions. Both of these processes are regularly used in A/P arbitrations.

- Witnesses “add to the costs, both when a witness statement is prepared and considered and when the witness attends to give oral evidence” Thus, suggests the ICC guide, limit witnesses to those “whose evidence is required on key issues.”⁷⁵ Good advice, but sometimes difficult to enforce since most counsel would be inclined to contend that each witness that they offer is to some extent

⁷² See COMM’N ON ARBITRATION, INT’L CHAMBER OF COMMERCE, *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION* (2007), and UNCITRAL, *Notes on Organizing Arbitration Proceedings*, 1996, U.N. Doc A/51/17; GAOR 29th Session for assistance in the planning phase of the proceeding.

⁷³ See Kaufmann-Kohler, *supra* note 71, at ¶¶ 31-34.

⁷⁴ A variant allocates time to discrete portions of the parties’ presentations (e.g., cross examination of witnesses) so identified at the case-management conference, for more detailed chess-clocking.

⁷⁵ *TECHNIQUES FOR CONTROLLING TIME AND COSTS IN ARBITRATION*, *supra* note 72 at ¶ 63.

vital to their case. These issues should be discussed and, if possible, resolved at the case-management conference. Joint stipulations of uncontested items are also an excellent method of shortening a witness list.

- “Hot-Tubbing” refers to expert witnesses being examined concurrently. This technique is employed regularly in international arbitrations in Hong Kong, Singapore, Korea, Malaysia and elsewhere in the A/P region. It is common for A/P tribunals to take a pro-active approach to expert evidence, particularly as it relates to C/E disputes. For example, there will often be a disagreement about what delay was caused to an infrastructure project, and by whom, and with what consequences. Delay experts are usually able to choose from a range of different analytical techniques. Thus, one party’s expert may select a particular methodology, while the other may consider that a different technique is more suitable. If the arbitral panel simply issues an order for experts to meet, produce reports and be cross-examined, the tribunal is likely to find itself faced at the hearing with ‘ships passing in the night’—two different procedures being advanced and little engagement between the two experts. However, arbitrators, particularly in Hong Kong and Singapore, now specifically require the experts to disclose at the case-management conference, which methodology they intend to use, and, if there are two different techniques being employed, to require each expert to use both techniques so that “like may be compared with like.” In similar fashion, the experts will be requested to identify, in advance, the various assumptions they propose to build into their analyses so that as much common ground as possible can be achieved. Under these circumstances the Hot-Tubbing procedure permits simultaneous and meaningful examination of the experts so that ambiguities and other queries are resolved with reasonable dispatch.

A variant of Hot-Tubbing used in many United States C/E arbitrations as well as (though less commonly) in the A/P is having several party representatives with detailed knowledge of different aspects of a particular claim testify and be subject to cross examination as a group. Thus, for example, a subcontractor’s field representative, its heavy equipment operator and its cost estimator, might present themselves simultaneously rather than seriatim with a resultant savings in time and an increase in efficiency.

Finally, the ICC guide states that it is helpful “to start with a presumption that expert evidence will not be required.”⁷⁶ Hot-Tubbing is an effective way of insuring that only the essentials of expert opinions are submitted and considered by the arbitral panel.

IV. CONCLUSION

Judge Posner comments in his *Leatherby* opinion that, “[n]o one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties,”⁷⁷ but in many arbitrations, especially international ones, this is a system that is time tested and reliable. And when, as Judge Posner also observes,⁷⁸ the subject matter expertise of the arbitral tribunal is added to the mix, the odds of the proceeding reaching a “swift, inexpensive and effective result” are significantly enhanced.⁷⁹ With this solid foundation and the willingness of the A/P states to incorporate the latest innovations and procedures into their proceedings the future of international arbitration and mediation in this dynamic area appears secure.

⁷⁶ *Id.* at ¶ 65.

⁷⁷ See *Leatherby*, 714 F.2d at 680.

⁷⁸ *Id.* (noting “The professional competence of the arbitrator is attractive to the businessman because a commercial dispute usually possesses its own folkways, mores and technology”).

⁷⁹ Goals that the *Leatherby* arbitration, which lasted three years and produced a hearing transcript of 16,000 pages, unfortunately did not attain.